ATTACHMENT A

ASST **ATTY GEN**

COMMONWEALTH of VIRGINIA

Niary Sue **Terry**
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*Office of **the** **Attorney** General*

October 19, 1989

The Honorable John G.'Dicks, III Member,
House of Delegates P.O. Box 247
Chesterfield, Virginia 23832

My dear Delegate Dicks:

You ask two questions concerning the vested rights of a landowner (the "owner") whose real property may be affected by regulations adopted on September 20, 1989, by the Chesapeake Bay Local Assistance Board (the "Board") pursuant to the Chesapeake Bay Preservation Act, SSI.10.1-2100 through 10.1-2115 of the Code of Virginia (the "Act"). With respect to a detailed fact situation, you ask (1) whether the owner has a vested right under existing law to construct a single family home on each lot he has developed even if the requirements in the Board's regulations otherwise would preclude such development, and (2) whether a purchaser for value of a developed lot succeeds to whatever vested property rights the owner may have.

Facts

The owner acquired approximately 235 acres of unimproved land on December 30, 1986. This property was rezoned by the county board of supervisors on January 15, 1987, from an agricultural zoning classification to a conditional residential classification for townhouses and single family residences. The owner, by proffer, limited the density of the development to 290 single family residences and 50 townhouses.

The owner received a number of county approvals and permits, as well as some state and federal permits, for the development, which was designed as a planned residen- tial community. The owner recorded a series of ten subdivision plats between May 14, 1988 and May 23, 1988. The plats were recorded pursuant to the county's subdivision ordinance, after approval by the county's subdivision agent, as required by 99 15.1-473(b) and 15.1-475. The recorded plats divided the property into 267 single family residential lots, with additional recreational and open spaces.

On June 9, 1988, the owner and the county entered into a subdivision agreement pursuant to which the owner agreed to locate and construct all physical -improvements in accordance with the county's subdivision ordinance and with plans approved by the county. The owner posted a $1,900,000 performance bond to secure the completion of the designated improvements.

The owner and the county entered into a water agreement on September 28, 1988, pursuant to which the county agreed to provide water to the development at the owner's expense, and the owner agreed to construct the necessary facilities to provide water in reliance upon the county's agreement to assume responsibility for the operation and maintenance of such facilities. On January 28, 1988, the county g7ranted the owner a land disturbing permit bonded at $74,000. In addition, on February 18, 1988, the county granted the owner a conditional use permit to locate a yacht club, marina and miscel- laneous recreational uses and facilities within the development.

On October 14, 1987, the owner borrowed $6,400,000 to finance this entire devel- opment and, on April 27, 1989, borrowed an additional $1,500,000. During the spring of 1989, the owner substantially completed the development's infrastructure so that all lots were ready for sale and subsequent construction. You state that the owner has spent more than $8 million preparing the development for the construction of single family residences and related amenities, including roads, water and sewer systems, and recre-

ational facilities.

Since late in 1987, the owner has sold 180 lots, an additional 20 lots are under con- tract, and 67 lots remain unsold. The owner believes that 26 of the sold or contracted lots, and 41 of the lots that remain to be sold, are within the probable boundaries of the Chesapeake Bay Preservation Areas which the Board's regulations require the county ' ' designate. The owner also believes that, if the vegetated buffer requirements contained in the Board's regulations apply to these 67 lots, many will no longer contain a viable building site, and some may contain no building site at all.

II- Applicable Statutes and Regulations

The Act was pa ed by the 1983 S@ession of the General Assembly and became effec- tive on July 1, 1938. The Act itself effects no zoning change., but it does require the Board to adopt regulations that (1) establish criteria for use by local governments to des- ignate Chesapeake Bay Preservation Areas and (2) establish criteria for local govern- ments to use in deciding requests to rezone, subdivide, or to use and develop land in such areas. See 5 10.1-2107. The Act also provides, in 9 10.1-2115, that its provisions 'shall not affect vested rights of any landowner under existing law."

On September 20, 1989, the Board completed its adoption of the Chesapeake Bay Preservation Area Designation and Management Regulations, VR 173-02-01 (the 'Regula- tions"). *See* 6:1 Va. Regs. Reg. 11-24 (Oct. 9, 1939). Pursuant to 9 2.2 of these Regula- tions, Tidewater localities will have until Se6tember 20, 1990, to designate Chesapeake Bay Preservation Areas and to adopt performance criteria for these areas that satisfy the requirements of Part IV of the Regulations. Id. at 14. The change of zoning required by the Act, therefore, is not yet in force and is not required to be in force before Sep- tember 20, 1990.

ichapter 608, 1988 Va. Acts 784, 792-96.

The Regulations also require that Chesapeake Bay Preservation Areas normally include a buffer 100 feet landward of tidal shores and certain other sensitive land fea- tures. Id. .9 3.2(B)(5), at 15. In small lots, or in lots with an unusual configuration, it may not bi! possible to preserve the 100 foot buffer and still have a viable building lot.

The Regulations further provide for special or hardship exceptions. Section 4.3(B)(2) permits a reduction in the buffer width to not less than 50 feet, when necessary, to prevent the loss of a buildable area on a lot recorded before October 1, 1989, the effective date of the Regulations, provided the modifications are the minimum needed to achieve a reasonable buildable area, and, if possible, an equivalent area on the lot is established to maximize water quality protection. Id. at 18. Section 4.5(A)(1) of the Regulations authorizes local governments to establish an administrative procedure to waive or modify the criteria for structures on legal nonconforming lots, provided there will be no net increase in nonpoint source pollutants and the erosion and sediment control requirements are satisfied. Id. at 19. Section 4.6 authorizes exceptions to the criteria, provided that the exceptions are the minimum necessary to afford relief and that they are reasonably and appropriately conditioned in light of the purpose and intent of the Act. Id. at 20.

Ill. Vested Rights Determination Requires Government Approval and Substantial Expense in.Reliance on Approval

Any determination of vested rights of a landowner depends upon the facts of each particular case. The doctrine of vested rights, sometimes referred to as "equitable estoppel," operates to reconcile the conflict between legislation enacted to provide for society's changing needs and the stability a developer or owner needs to plan and com- plete a project successfully. 1-i addition to 9 10.1-2115 of the Act, 9 15.1-492 also recog- nizes the vested rights of property owners by limiting the application of local zoning ordinances to existing uses. There is no specific statutory language, however, that estab- lishes at what point in the development process a developer acquires a vested right to complete a project, despite an intervening zoning or other legislative change.

"[Tjhe mere purchase of land does not create a right to rely on existing zoning." Vienna Council *v. Kohler,* 218 Va. 966, 976, 244 S.E.2d 542, 548 (1978). The recordation of a subdivision plat or the dedication of a right-of-way, standing alone, generally is not sufficient to establish a vested right in a contemplated use of land. I & 4 R. Anderson, *American Law of Zoning 3d* 99 6.22, 25.23 (1986 & Cum. Supp. 1988); 8A E. McQuillin, *The Law of Municipal Corporation3 9* 25.188 (3d ed 1986). Once an owner "has obtained a permit valid under existing zoning and in good faith incurs substantial obligations in reli- ance thereon, his rights to complete the project are generally protected against subse- quent zo ning amendments." @ 7 P. Rohan, Zoning and Land *Use ControLi* !; 52.08[41, at 52-83 (1989). This determination should be made on a case-by-ease basis. I R. Anderson, *supra 9* 6.23. The right to complete a development generally refers to the extent of development covered by the permit. *Compare Aveo Com. Developer3 v. South Coa-st,* 17 Cal. 3d 785, 132 Cal. Rptr. 336, 389, 553 P.2d 546, 550 (1976) [hereinafter "Avco").

If other conditions in the permit process have been met, obtaining.a valid building permit usuajly entitles the permittee to complete a building pursuant to the permit

within a specified time without having to comply with subsequent zoning changes. See *Fairfax* County v. Medical *Structures,* 213 Va. 355, 358, 192 S.E.2d 799, 801 (1972); Chapel *Creek,* Ltd. v. Mathews *County,* 12 Va. Cir. 350, 353-54 (1988); Aveo,,3upra.

These general rules have been modified in Virginia by two cases that place more emphasis on good faith expenditures to complete government approved projects, even though no permit for the construction has yet been issued. The Supreme Court of Vir- ginia has recognized that

> in many urban localities, the site plan has virtually replaced the building permit as the most vital document in the development process. Every site plan submitted under the Fairfax County Zoning Ordinance (Chapter 30, Code of Fairfax County) must contain, among other things, topographical maps, surveys, engineering studies and proof of notice to landowners,in the vicinity. The filing of such a plan creates a monument to the developer's intention, and when the plan is approved, the building permit, except in rare .situations, will be issued.

Fairfax County v. *Medical Structure.?,* 213. Va. at 357-58, 192 S.E.2d at 801. In the Med- *ical* Structures case, the owner had obtained a special use permit under an existing zon- ing classification, filed and diligently pursued a bona fide site plan, and incurred substan- tial expense in good faith before a change in the local zoning ordinance. The Supreme Court held under these facts that the P-ermittee had "a vested right to the land use described in the use permit and he cannot be deprived of such use by subsequent legisla- tion." Id. at 358, 192 S.E.2d at 801.

The Supreme Court also has held that a vested right existed when an oil company, after the issuance of a special use permit under existing zoning, purchased certain prop- erty based upon its value for the permitted use. *Fairfax County V. Citic-I Service,* 213 Va. 359, 193 S.E.2d 1 (1972). The company had filed a preliminary site plan after a zoning amendment that would have restricted the development had been advertised, but before it was adopted. The Supreme Court held "that [the company's] right to the land use described in the use permit vested upon the filing of the site plan." Id. at 362, 193 S.E.2d at 3.

The question presented by your inquiry, therefore, is whether the owner has ob- tained the requisite government approvals for his project, and has incurred sufficient expense in good faith reliance on those approvals, to acquire a vested right to complete the development as approved.

IV. Owner Has Vested Rights in Facts Presented

As discussed above, the existence of a vested right depends upon the specific facts in each case. *See I* R. Anderson, supra 9 6.23; Ru-"ell v. Town *of Stephem City,* 12 Va. Cir. 180, 183 (1988). In determining when vested rights accrue, it is important to note that different localities control their land use and development in different ways throughout the Commonwealth, within the scope of zoning and subdivision enabling stat- utes. No attempt has been made to analyze the facts you present under the requirements of any specific local ordinance.

In this instance, the owner has no building permit, no special use permit and no site plan. Nonetheless, the county rezoned the property to authorize the project for a maxi- mum of 290 single family residences and 50 townhouses. The subdivision of the property by ten separate plats was approved by the county presumably in accordance with appli- cable subdivision requirements. Furthermore, the owner entered into a subdivision agreement with the county that provided that the location and construction of all improvements would be in accordance with plans approved by the county. The subdivi- sion agreement was backed by a $1,900,000 performance bond. Prior to the effective date of the Act, the owner expended virtually all the funds necessary to develop the property for sale as single family lots in accordance with the conditional rezoning and plats approved by the county.

The facts in this case can be compared to those in *Medical Structures.* In the facts you present, rather than a special use permit for a commercial project, the owner has secured a conditional rezoning of the property for a projected maximum of 290 single family and 50 townhouse units and a bonded subdivision agreement to construct extensive improvements in accordance with plans approved by the county. The bonded plans are certainly a monument to the owner's intention irrevocably to commit the property to the development. In fact, the actual construction of extensive infrastructure and other improvements has been completed. In *Medical Structures,* the developer expended funds to prepare a site plan. In this case, the owner has had the property rezoned and its sub- division approved, and has constructed extensive improvements. The facts you present are distinguishable from the facts considered in Medical Structure because of the numer- ous residential lots involved rather than the construction of a single commercial project. Nevertheless, significant authority supports the application of the vested rights doctrine in the facts you present.

In general,

> [t]he mere filing of an approved subdivision plat does not stake out a noncon- forming use of the platted land which insulates it from subsequent zoning changes. However, if the developer has proceeded and made expenditures to a substantial extent in reliance on the existing zoning and before the zoning change, he may be deemed to have established and be entitled to a non- conforming use.

82 Am. Jur. 2d *Zoning and Planning S* 168, at 672 (1976) (footnotes omitted). In *Milcrest Corp. v. Clackamas County,* 59 Or. App. 177, 650 P.2d 963, 966 (1982), the court found 'a vested right In a non--conforming use" when a developer, after his planned unit develop- ment was approved by the county, "substantially commenced the project, made substan- tial expenditures, acted in good faith and cannot use the development that has taken place for conforming alternative uses from which plaintiff can obtain a reasonable eco- nomic return."

In the facts you present, the owner, pursuant to county approved plans, expended substantial funds in preparing subdivided lots for single family residential use, including building the roads and installing the water and sewer lines. These improvements were completed as approved before the Act became effective and more than two years before

any regulations adopted pursuant to the Act take effect. It is my opinion, therefore, that the'owner has established a vested right to use the land for the purpose approved by the county, subject to the requirement that he comply with the new requirements to the greatest extent possible. Because nonconforming uses are contrary to public policy, "they are protected only to avoid injustice and that is the limit of their protection against conformity." 8A E. McQuillin, supra *5* 25.182, at 18;.3ce *id. S* 25.183. A lot large enough to contain a vegetated buffer, therefore, must have such a buffer area reserved, even though the owner has a vested right to use the parcel if the buffer requirements could not have been met.

Vested Rights Are 'I'ransferable

The right to maintain an existing use attaches to the real property itself, and "pur- chasers of property constituting a non-conforming use who had knowledge of the ordinance are entitled to the'same rights under the ordinance as their grantors.' Sander- son *v. DeKalb County* Zoning *Board of Appeals,* 24 111. App. 3d 107, 110, 320 N.E.2d 54, 57 (1974). The owner in the facts you present developed his land with the intention of selling residential lots. A vested right that he could not transfer to his purchaser would lose a substantial portion of its value. For the purposes of the Act, there is no difference between whether the developer or an individual owner builds a house on a particular lot. It is my opinion, therefore, that a purchaser of a developed lot from the owner generally succeeds to whatever vested property rights the owner may have. The vested rights',*
whether in the present -owner or in a S'dbsequent purchaser, however, do not continue indefinitely, but must be exercised within a reasonable period of time. While the rights of the locality to change its zoning powers can be suspended for a reasonable time to allow the diligent, good faith completion of an approved development, these rights can- not be suspended indefinitely. Absent this diligent, good faith completion of the ap- proved development within a reasonable time, the vested rights of the owner or subse- quent purchaser will be lost, and the lot will become subjeqt to the current zoning requirements. *See Dwyer v. McTygue,* 137 Misc. 2d 18, 519 N.Y.S.2d 630 (1987).

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With kindest regards, I am

Sincerely,

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Mary Sue Terry
Attorney General

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